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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

CISCO SYSTEMS, INC.) AU:13-CV-00492-LY
)
VS.) AUSTIN, TEXAS
)
INNOVATIVE WIRELESS SOLUTIONS, LLC,)
INNOVATIVE WIRELESS SOLUTIONS, LLC,)
CISCO SYSTEMS, INC.) AUGUST 28, 2013

RUCKUS WIRELESS, INC.) AU:13-CV-00504-LY
)
VS.) AUSTIN, TEXAS
)
INNOVATIVE WIRELESS SOLUTIONS, LLC) AUGUST 28, 2013

TRANSCRIPT OF INITIAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEE YEAKEL

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Proceedings recorded by computerized stenography, transcript
produced by computer.

14:29:00 1 (Open Court)

14:29:00 2 THE COURT: I scheduled two cases for this afternoon
14:29:03 3 for what I call an initial pretrial conference. The first is
14:29:09 4 Cause Number 13-CV-492, *Cisco Systems, Inc. v. Innovative*
14:29:21 5 *Wireless Solutions*, and the second, 13-CV-504, *Ruckus Wireless,*
14:29:37 6 *Inc. v. Innovative Wireless Solutions.*

14:29:37 7 So let me get announcements first as to who's here.
14:29:37 8 Just start to my right.

14:29:37 9 MR. YUNGWIRTH: Yes, Your Honor. Matt Yungwirth,
14:29:39 10 here today on behalf of Cisco Systems, Inc. and Ruckus
14:29:43 11 Wireless.

14:29:43 12 MR. SENCENBAUGH: Your Honor, Adam Sencenbaugh with
14:29:45 13 Haynes and Boone on behalf a Cisco Systems, Inc.

14:29:48 14 MS. WOOD: Your Honor, Stephanie Wood with Farney
14:29:51 15 Daniels for Innovative Wireless Solutions.

14:29:54 16 THE COURT: All right. Thank you. I set these for
14:29:56 17 the same time because they looked fairly similar and looked
14:29:59 18 like they had the same issues. And I'm willing to be dissuaded
14:30:03 19 from that, but I thought I would hear it all at one time.

14:30:07 20 Oh let me initially ask: Are these cases similar
14:30:14 21 enough to where they should proceed with parallel scheduling
14:30:20 22 orders and be handled in the same manner, or are they totally
14:30:24 23 different? And whoever wants to speak first can.

14:30:26 24 MR. YUNGWIRTH: Your Honor, at this point in time we
14:30:38 25 are fine with proceeding on parallel scheduling orders. When

14:30:42 1 it comes to trial, we may be in a situation where we're asking
14:30:46 2 for separate trials. We currently have limited knowledge as to
14:30:52 3 the theory of infringement that will be pursued by the -- by
14:30:57 4 the defendant. This is a declaratory judgment action, and they
14:31:01 5 reached out to some of our customers and we responded and are
14:31:05 6 seeking declaratory judgment of noninfringement and
14:31:09 7 invalidity. Based on the allegations in their letters and how
14:31:13 8 we understand their allegations to be teed up, we believe that
14:31:17 9 there will be some substantial overlaps. But as the case
14:31:21 10 evolves, that may prove to be incorrect.

14:31:24 11 THE COURT: Counsel, let me hear from you.

14:31:26 12 MS. WOOD: Thank, Your Honor. Defendant agrees that
14:31:28 13 there will be substantial overlap and would actually prefer the
14:31:32 14 two cases be consolidated pretrial. It's the same three
14:31:35 15 patents that are in suit and the same types of technology --
14:31:39 16 wireless routers and wireless access points. We think that it
14:31:44 17 would be more efficient if they were consolidated for pretrial.

14:31:48 18 THE COURT: Well, I generally am of the persuasion
14:31:51 19 that it will always be more efficient because then we don't
14:31:54 20 face issues down the line about whether a certain deposition
14:31:57 21 that was taken should only be -- the statements should only be
14:32:01 22 admissible in one case or another case because it wasn't
14:32:04 23 specifically designated that it was in the other case and
14:32:10 24 things like that. But you-all are aware of that because you're
14:32:13 25 patent lawyers. So you know every little way to make it harder

14:32:16 1 for the trial court than the normal lawyer does.

14:32:18 2 What my inclination would be is to -- because it
14:32:26 3 solves that problem, is to consolidate the cases, render one
14:32:33 4 scheduling order with the understanding that if the case does
14:32:37 5 not get resolved by dispositive motion or by settlement or both
14:32:43 6 of them don't get resolved, either party can file a motion for
14:32:48 7 separate trials and we can try them separately. I don't have a
14:32:53 8 problem with that. What clogs my docket is not trials; it's
14:32:57 9 pretrials. So does that work for you-all?

14:32:59 10 MR. YUNGWIRTH: That's fine with us, Your Honor.

14:33:01 11 MS. WOOD: That's defendant's preference. Thank you,
14:33:05 12 Your Honor.

14:33:05 13 THE COURT: All right. Now, that having been said,
14:33:17 14 are you-all aware of the way I handle patent cases, and have
14:33:18 15 you looked into -- I'm sure you've Googled me to death. You
14:33:20 16 know more about me than I do. Who wants to give me the ages of
14:33:24 17 my grandchildren first? One of you knows it.

14:33:27 18 Have you had an opportunity or taken an opportunity
14:33:30 19 to sit down and discuss deadlines and dates and what you need.

14:33:35 20 MR. YUNGWIRTH: Your Honor, we did, and I believe we
14:33:37 21 are familiar with your standard practices in patent cases. If
14:33:42 22 I'm correct about that, it would entail an early Markman
14:33:47 23 hearing and the other deadlines in the case being deferred
14:33:49 24 until after that. And I did discuss that with Ms. Wood, I
14:33:53 25 believe, last week.

14:33:54 1 THE COURT: Well, you're basically right. The
14:33:56 2 question of whether the Markman hearing is early depends on
14:34:00 3 when you tell me you can be ready for Markman hearing. I have
14:34:04 4 yet to see the case -- I've been doing this 10 years now --
14:34:08 5 where I really thought that there was ever a need for any
14:34:11 6 discovery pre-Markman. But every lawyer that appears in front
14:34:15 7 of me tells me, Oh, no. We've got to do discovery pre-Markman.
14:34:20 8 So I always give you some reasonable time for discovery, and
14:34:24 9 then I have the Markman hearing. And even after the Markman
14:34:27 10 hearing, I can't figure out why any discovery was necessary for
14:34:31 11 the Markman hearing.

14:34:32 12 So let me give you the tip-off. And that is that,
14:34:39 13 even before the Federal Circuit wrote about it, I believed that
14:34:43 14 it would be the rare case where I needed anything outside of
14:34:48 15 the intrinsic record to make a determination on claims
14:34:52 16 construction. Nothing has changed my mind on that, but I'm
14:34:57 17 going to -- I will give you what opportunity and what time you
14:35:04 18 believe that you really need to put that together.

14:35:10 19 I generally always like to have a tutorial at some
14:35:14 20 point, but let me tell you about the tutorial. A tutorial in
14:35:22 21 my court is for you to explain to me how your science works and
14:35:27 22 what's at stake here. For instance -- and I haven't read any
14:35:34 23 of the technical things in this case -- let's say Ruckus builds
14:35:41 24 a device that does A, B, C, D, and E. Innovative Wireless
14:35:46 25 Services builds a device that Ruckus thinks is doing the same

14:35:53 1 thing. I want to know what that process is, and I want to know
14:35:56 2 the difference in the devices without advocacy.

14:36:00 3 The reason I call it a tutorial is I don't want -- I
14:36:03 4 don't care who's right or wrong. I don't want you to argue
14:36:06 5 who's right or wrong. And I want as little advocacy as I can
14:36:12 6 get -- and y'all can be seated -- although there has to be some
14:36:16 7 overlap and you're going to have some disagreement. But I
14:36:19 8 don't want you to take the bait your opponent throws down and
14:36:23 9 think you've got to argue it at the tutorial. I want to
14:36:26 10 understand technically what's at stake here and what we're
14:36:32 11 doing.

14:36:32 12 What I want you to do in the tutorial is get me up to
14:36:35 13 a level in your science where I can understand what your
14:36:37 14 disagreement is. You know, you're claiming that a bunch of
14:36:42 15 little electrons go through one gate that does this, and that
14:36:46 16 is what your product does and she's infringing on it. She
14:36:50 17 says, No, no. The electrons go through the other gate, and
14:36:55 18 that makes a difference. That's what I want to know about.

14:36:57 19 The reason I take the time to tell you this right now
14:36:59 20 is, somehow, when I go to these patent seminars -- I think
14:37:02 21 there are a lot of judges around the country, if not all of
14:37:05 22 them, that like tutorials. Somehow, what has crept into the
14:37:09 23 vernacular at these seminars -- and it darn sure is true in
14:37:12 24 Austin, and I don't know where it came from -- is the phrase
14:37:15 25 "claims construction tutorial." That is not what it is in my

14:37:19 1 court. It is totally unrelated to claims construction. It is
14:37:23 2 totally unrelated to what terms mean. It has nothing to do
14:37:28 3 with your Markman hearing.

14:37:29 4 So I just want to make that clear to you-all so you
14:37:34 5 don't get off trying to think I'm doing something. A tutorial
14:37:36 6 is totally different. I like to have it before the Markman
14:37:40 7 hearing because I like to understand the science before I start
14:37:45 8 hearing you argue what terms should mean. But it doesn't have
14:37:50 9 to be that way. We can hold a tutorial tomorrow before you've
14:37:57 10 even thought about Markman very much.

14:37:58 11 So, one, get that out of your thinking. It is a
14:38:02 12 technical tutorial that is totally unrelated to Markman. It
14:38:06 13 just comes within the first part of the process in your case,
14:38:10 14 the pre-Markman time, because I like to learn the science
14:38:14 15 before I start trying to figure out who's right on what the
14:38:16 16 terms mean -- what the claims mean. So know that.

14:38:21 17 It can come close to Markman. Sometimes lawyers like
14:38:27 18 it to come close to Markman because if you're going to have
14:38:32 19 your inventor or expert in here, sometimes it's easier to have
14:38:36 20 that person in just before we have the Markman hearing. But
14:38:40 21 it's unrelated to Markman. So know that. Don't spend a lot of
14:38:43 22 time and don't spend a lot of your client's money on trying to
14:38:47 23 in some way link the tutorial to the Markman hearing, because
14:38:51 24 that's not what it's going to be.

14:38:55 25 Now, about the tutorial: It will be off the record.

14:38:59 1 There will not be a court reporter present. We will do it in
14:39:03 2 the courtroom because there's usually a lot of people. And, if
14:39:06 3 not, we have more room to spread out depending on what you want
14:39:09 4 to do. I give you each the same amount of time because that's
14:39:15 5 fair. But -- and the plaintiff goes first because that's just
14:39:20 6 the easy way to do it because it's above the "v." But if it
14:39:25 7 works the way it should work, the defendant will not take as
14:39:29 8 much time as the plaintiff because we're not arguing. We're
14:39:33 9 presenting a presentation on the science. And so if you-all
14:39:36 10 are playing it straight, a whole lot of what the plaintiff puts
14:39:42 11 on is the same thing the defendant is going to tell me about
14:39:44 12 the science. And I don't need to hear it twice. But you'll
14:39:47 13 each have equal time just because you feel better about that.

14:39:51 14 You can put it on any way you want to. You can have
14:39:55 15 an inventor explain it to me. That's often very good. You can
14:40:01 16 bring me -- to the extent your product is capable of being
14:40:07 17 something I can hold in my hand or see or something, that's
14:40:10 18 really helpful because what you're doing is educating me.

14:40:14 19 You can present it the way most lawyers like to do
14:40:17 20 it, which is the least effective way, and that is a lawyer can
14:40:21 21 present a PowerPoint on the science. Believe me, your
14:40:26 22 inventors are better at this than you are no matter what you
14:40:29 23 think because we're off the record on it. But if you want to
14:40:33 24 do it because you haven't finished your PowerPoint allotment
14:40:37 25 for the month yet, you're welcome to do it that way. But I

14:40:40 1 don't find it particularly useful to me. What I'm trying to do
14:40:44 2 is learn about what you're doing, and that's what I want to
14:40:48 3 see. And you can do it any way you want to.

14:40:50 4 And, again, it's not going to be on the record.
14:40:52 5 Nothing anybody says during the Tutorial hearing can be brought
14:40:55 6 up at any other phase to say, well, they said this at the
14:40:58 7 Tutorial hearing. It is a non-advocacy deal. It is just
14:41:02 8 letting me know what your science is.

14:41:04 9 At the -- at the claims construction hearing, I don't
14:41:13 10 have a fixed way I do claims construction. I want you to argue
14:41:18 11 every claim you have. I don't want you to have a number of
14:41:23 12 claims and say, well, at the hearing we're going to argue five
14:41:29 13 of the 23 claims and let you deal with the rest of them out of
14:41:33 14 our briefing. No. I don't want to do that. If it's important
14:41:36 15 enough that it's a disputed claim term, you've got to get
14:41:40 16 prepared and you've got to tell me why you're right on it. So
14:41:43 17 know that.

14:41:44 18 I urge you to get together and pare down your claims
14:41:54 19 for a lot of reasons. Number one, time is precious in federal
14:41:58 20 courts, and it's getting more precious. I have not yet come up
14:42:02 21 with a rule to tell you you can't have more than X claims or Y
14:42:07 22 claims. I do that for a lot of reasons. Number one, I've
14:42:12 23 generally gotten enough cooperation out of the lawyers to where
14:42:15 24 you pare it down to something you know you're going to argue
14:42:19 25 anyway, the important ones. But, secondly, no matter how mad

14:42:22 1 it makes me -- and I realize the Circuit has gotten a little
14:42:26 2 bit flexible on this -- you do have the right to have the terms
14:42:31 3 that you think are in dispute construed by the Court, no matter
14:42:37 4 how many of them there are. I would hope that you would
14:42:41 5 automatically eliminate the ones that are not outcome
14:42:46 6 determinative. But work together and come up with as few
14:42:49 7 claims as you can that you think will absolutely have an effect
14:42:53 8 on the case.

14:42:54 9 Because I can pick out which ones that you're not
14:42:57 10 really serious about that you want to have hide in the record
14:43:01 11 until you get to the Federal Circuit after you've lost down
14:43:04 12 here and you start combing through the record and say, Aha.
14:43:09 13 Here's claim 26. The court got that wrong, and that suddenly
14:43:13 14 becomes the primary issue at the Federal Circuit. I can assure
14:43:17 15 you the Federal Circuit is also aware of that. So it's better
14:43:20 16 if you don't do it.

14:43:22 17 But what I do is we will set a schedule up through
14:43:31 18 claims construction. And how quickly we get to claims
14:43:34 19 construction depends on what you as lawyers tell me you need in
14:43:39 20 the way of time to get there. I don't set an arbitrary date
14:43:43 21 out there. This is your case. It's your clients' case. It's
14:43:46 22 not my case. I'm here every day, and I can either be working
14:43:49 23 on your case or I can be working on somebody else's case.

14:43:53 24 So with that in mind, have you-all yet had an
14:43:59 25 opportunity to discuss any dates or work along toward that

14:44:03 1 goal?

14:44:04 2 MR. YUNGWIRTH: Your Honor, we didn't discuss
14:44:06 3 specific dates, but I'm happy later this week or by the
14:44:10 4 beginning of next week to submit something to the Court, if
14:44:13 5 you'd like us to do so, with a proposed schedule leading up to
14:44:17 6 the Markman hearing itself.

14:44:18 7 THE COURT: Well, here's what happens -- and y'all
14:44:20 8 can be seated again -- once I sign the schedule, I will lift
14:44:26 9 the stay I've imposed on you. And I'll lift the stay only to
14:44:32 10 satisfy the matters that are on the scheduling order. What
14:44:38 11 that means is I want to get Markman out of the way before you
14:44:42 12 do general discovery. I realize that's a problem. It costs
14:44:48 13 you your trips right away. You know, you might not be able to
14:44:51 14 work in the depositions in Hong Kong over the Chinese New Year
14:44:55 15 if we're not going to have the Markman hearing until March or
14:44:59 16 something like that.

14:45:01 17 But all judges I think get tired of hearing how
14:45:05 18 expensive patent cases are. And I say again, it's not the
14:45:09 19 trial that's expensive. It's the lead up to the trial that's
14:45:13 20 expensive. A lot of cases do settle after a claims
14:45:16 21 construction order is rendered. So that's why I like to do
14:45:20 22 everything up to claims construction. And then what happens
14:45:23 23 after you've had your claims construction hearing, whenever we
14:45:27 24 can get it done, you will get your Markman order. And the last
14:45:34 25 part of that Markman order will set a new scheduling conference

14:45:38 1 for roughly 45 days after the date of that order and instruct
14:45:41 2 you to use that 45 days to, one, see if you can settle the case
14:45:45 3 now that you know the way the terms are going to be construed
14:45:49 4 or, two, if you can't, to work out a schedule for what you need
14:45:52 5 to do then from that point forward through trial, which is your
14:45:57 6 general discovery and what you do.

14:46:00 7 So you're -- nobody needs to panic. You're in-house
14:46:03 8 counsel doesn't need to panic. Your clients don't need to
14:46:07 9 panic. You're going to get ample time to do everything you
14:46:10 10 want to do. You're just not going to get it before claims
14:46:13 11 construction.

14:46:14 12 Now, have you-all had an opportunity to review what
14:46:17 13 my kind of outline is on the kind of things I want to see in
14:46:22 14 the scheduling order?

14:46:23 15 MS. WOOD: Defendant has, Your Honor.

14:46:25 16 THE COURT: All right. Well, here. Let me give --
14:46:28 17 do we have some more copies of this? All right. Make a copy
14:46:32 18 for each of them of this.

14:46:34 19 And we're not going to go over it and fill in dates
14:46:37 20 today. You don't have to do it until when you have your
14:46:43 21 calendar in front of you. But basically there's going to be a
14:46:45 22 date for disclosure of claims and infringement contentions, a
14:46:49 23 date for disclosure of invalidity contentions, a date to
14:46:53 24 identify claim terms to be construed. Then I want a joint
14:46:56 25 claims construction statement that is in the traditional way of

14:47:03 1 the term to be construed, what the plaintiff wants and what the
14:47:06 2 defendant wants so I can just look at them side by side, and
14:47:09 3 it's helpful to me, with citations to the intrinsic record as
14:47:14 4 to why you get it that way.

14:47:16 5 If the inventor uses "cat" 37 times to mean the small
14:47:20 6 feline animal and one side says "cat" really means "dog," then
14:47:25 7 I want to know where in the patent do I see the inventor using
14:47:28 8 it this way and why the other side, says, No, no. It really
14:47:32 9 means something else.

14:47:38 10 We'll set a date when your claims construction
14:47:41 11 discovery closes and then time for an opening brief and a time
14:47:45 12 for reply brief. That will be -- you may be seated. There
14:47:52 13 won't be any plaintiff files a brief, defendant responds,
14:47:58 14 plaintiff replies, because nobody has the burden of proof in
14:48:01 15 claims construction -- or the burden of persuasion. You both
14:48:07 16 do. We're just looking at terms. So I want both claims --
14:48:12 17 plaintiff and defendant's opening briefs the same time and
14:48:15 18 their replies the same time.

14:48:17 19 Now, what you won't -- you can make suggestions as to
14:48:26 20 when you want your tutorial and when you want your Markman
14:48:30 21 hearing, but I'm going to have to -- those are the two things
14:48:35 22 I've got to fit into my calendar. How long do you really think
14:48:40 23 it will take to get this case ready for a Markman hearing?
14:48:43 24 Because maybe what we can do today is set your end dates and
14:48:48 25 then you can work out your schedule inside that. And knowing

14:48:56 1 that time goes by and if one of you wants something to happen
14:49:00 2 one month and one of you wants it to happen in another month,
14:49:03 3 we're just going to work it out because a month at the
14:49:05 4 beginning of a case means nothing.

14:49:06 5 So how much time do you-all realistically think it
14:49:10 6 will take you to get this case ready to have a claims
14:49:13 7 construction hearing on it?

14:49:15 8 MR. YUNGWIRTH: Your Honor, I think we could get it
14:49:16 9 done within six months or so. The only caveat that I have with
14:49:20 10 six months is that that would put us in the middle of February,
14:49:23 11 and I have a two-week trial in front of Judge Davis -- I'm
14:49:27 12 sorry -- a one-week trial in front of Judge Davis the second
14:49:30 13 week of February. So possibly, you know, six and a half
14:49:33 14 months, if that fits within Your Honor's schedule and works for
14:49:39 15 the defendant.

14:49:39 16 MS. WOOD: And we looked at your prior scheduling
14:49:42 17 orders as well and looked at on average it was about six
14:49:45 18 months. So based upon that, I looked at our schedule
14:49:48 19 internally. That works for Defendant as well.

14:49:51 20 THE COURT: Well, let me tell you about that. I'm
14:49:53 21 pleased you did that, but there's danger in that because of
14:49:56 22 what I told you at the beginning. You can't really compare
14:49:59 23 your case to any other scheduling order and think that's what I
14:50:02 24 want. The reason -- and it's just, I assure you, pure
14:50:08 25 happenstance that comes out to about six months because it's --

14:50:12 1 I set those dates based on what the lawyers tell me is a
14:50:17 2 reasonable period of time plus what their schedule looked
14:50:20 3 like. It's hard to believe, but I do recognize you probably
14:50:24 4 have more than one case.

14:50:25 5 So it's not what I want. What I want is a date I'm
14:50:29 6 not going to have to put off because that's what creates
14:50:36 7 trouble for me. I don't want to see a continuance on this. I
14:50:38 8 want to decide and you-all know that if we're going to have a
14:50:42 9 Markman hearing on this date, that is the date. So what is
14:50:45 10 your suggestion? If not February, when?

14:50:49 11 MR. YUNGWIRTH: My suggestion would be the last week
14:50:51 12 of February or the first week of March or the second week of
14:50:55 13 March. Whatever works for Your Honor and opposing counsel.

14:50:58 14 MS. WOOD: The last week of February and the first
14:51:00 15 week of March for the defendant.

14:51:02 16 THE COURT: Do you-all have any possible idea of how
14:51:15 17 many claims are going to be at play here and how much time
14:51:21 18 you're going to need for a Markman hearing?

14:51:23 19 MR. YUNGWIRTH: I know there was, I believe, only one
14:51:26 20 claim for each patent that identified in the correspondence
14:51:29 21 from Innovative. But I'm not sure if you have a better idea as
14:51:32 22 to ...

14:51:32 23 MS. WOOD: So there will be more than one claim from
14:51:35 24 each patent that's asserted, but the patents, all three, have a
14:51:38 25 common specification or a relatively common specification. So

14:51:41 1 because of that, it shouldn't be overly complicated.

14:51:44 2 THE COURT: So we can have a half-day Markman
14:51:47 3 hearing?

14:51:48 4 MR. YUNGWIRTH: Yeah. I think that would be fine.

14:51:50 5 MS. WOOD: That works for Defendant.

14:51:51 6 THE COURT: All right. Is it complex, or can we also
14:51:54 7 think about a half day for a tutorial?

14:51:58 8 MR. YUNGWIRTH: I think a half day would be fine for
14:52:00 9 a tutorial as well.

14:52:01 10 THE COURT: And that means you can take less than
14:52:03 11 that or, you know, if we had to, we could run over a little
14:52:06 12 bit. It's just easier for me to think in terms about whether
14:52:09 13 I'm going to knock out a morning for you or an afternoon for
14:52:12 14 you or a day for you than it is to -- to tie you down.

14:52:15 15 It sounds like each of these things can be done in a
14:52:18 16 half day. Here is the problem with late February: I am likely
14:52:27 17 to go to trial in another patent case on Tuesday, February
14:52:30 18 the 18, that could take two weeks or could take three weeks.
14:52:36 19 So we'll look at March just to be safe.

14:52:41 20 As you know, that case could settle, too. But until
14:52:45 21 it settles, it's not settled, and I have it on my docket. And
14:52:49 22 as soon as I say, We'll go ahead and schedule you in here
14:52:52 23 because it's likely to settle, you'll get all your people
14:52:56 24 cranked up and you'll get ready and then it won't settle. So
14:52:59 25 it's just easier if we look later. Do y'all have a reasonable

14:53:07 1 feel for what your schedule looks like right now?

14:53:10 2 MR. YUNGWIRTH: I had turned off my phone, and I'm
14:53:12 3 trying to get it to boot back up so it will show me my
14:53:17 4 calendar. But I think that I'm relatively open in early March,
14:53:21 5 Your Honor.

14:53:21 6 MS. WOOD: I know that we have a conflict March the
14:53:23 7 17th, which is actually also St. Patrick's day, but unrelated.
14:53:28 8 But the first or second week of March would work for defendant.

14:53:31 9 THE COURT: Well, my problem is, is if this case
14:53:33 10 takes the three weeks instead of the two weeks, I run through
14:53:39 11 the week of the 3rd of March. Now, what I could do -- well,
14:53:53 12 let's talk about this. We can do something the week of the
14:54:00 13 24th of March. Bear in mind I want to have a tutorial
14:54:09 14 somewhere. We could do -- if we needed to, we could do the
14:54:13 15 tutorial before February the 18th. That's when my other trial
14:54:17 16 starts. Or if you wanted to, we could do it close to Markman
14:54:22 17 just as long as you take me at my word and don't think, because
14:54:25 18 they come to close one another, that I think the tutorial has
14:54:28 19 anything to do with the Markman hearing. Because I don't.

14:54:31 20 And so I think I could safely have a Markman hearing
14:54:41 21 the 10th or the 11th or the 24th, 25th, or 26th. What's your
14:54:50 22 pleasure?

14:54:53 23 MR. YUNGWIRTH: Your Honor, I think we would prefer,
14:54:56 24 if it works for Your Honor, to have the tutorial, for example,
14:54:59 25 the day before the Markman so that it would just require one

14:55:03 1 trip here. And I promise we'll keep it to technology and not
14:55:06 2 to claims construction. And doing it the 25th and the 26th,
14:55:12 3 half a day on the 25th and a half day on the 26th, is fine with
14:55:16 4 us.

14:55:16 5 MS. WOOD: That's fine with Defendants as well.

14:55:18 6 THE COURT: All right. You've got -- if you have
14:55:21 7 witnesses coming in from out of town, as most patent cases do
14:55:25 8 or other people coming in from out of town or you coming in
14:55:29 9 from out of town, would you prefer on the 25th the morning or
14:55:32 10 the afternoon?

14:55:35 11 MR. YUNGWIRTH: We're open, Your Honor.

14:55:37 12 THE COURT: That's a Tuesday.

14:55:38 13 MR. YUNGWIRTH: What ever works best for you.

14:55:40 14 THE COURT: Well, it doesn't matter to me.

14:55:41 15 MR. YUNGWIRTH: Maybe do the morning of the 25th and
14:55:44 16 the morning of the 26th?

14:55:45 17 THE COURT: All right. Then here's what you should
14:55:51 18 think about for purposes of your scheduling order. I'm going
14:55:53 19 to set the tutorial for 9 o'clock on March the 25th, which is a
14:56:01 20 Tuesday, and the Markman for 9 o'clock on March 26th, which is
14:56:05 21 a Wednesday. So working with those dates, then you ought to be
14:56:13 22 able to back that up on the other things that I want.

14:56:19 23 Now, that doesn't mean that you can't -- that y'all
14:56:24 24 can't agree on other things that you want to do by certain
14:56:29 25 dates. Don't -- everything I do in my Court is a work in

14:56:33 1 progress. It's not cast in stone. So this is just a guide.
14:56:36 2 You've got to have a default somewhere, and so this is my
14:56:39 3 guide. So when you look down that list, these are things I
14:56:42 4 want to see by certain dates. But if you-all, for instance,
14:56:47 5 were to agree that you wanted to do subsets of these or
14:56:51 6 something else by certain dates, let me know. Put it in what
14:56:55 7 your proposal to me is, because once I sign the scheduling
14:56:59 8 order, it's going to be hard for you, if not impossible, to
14:57:03 9 change it because that's -- that's where we're going to go with
14:57:07 10 it.

14:57:07 11 Now, I would like, though, if we're going to have the
14:57:12 12 Markman hearing on March 26th, I want the last date anything is
14:57:20 13 filed, which would be your reply claims construction briefs, no
14:57:26 14 later than March the 12th. That gives me two weeks when I have
14:57:29 15 everything in front of me that's going to be filed or discussed
14:57:35 16 at the tutorial to be able to look at it and go over it. But
14:57:40 17 other than that, you can work out anything else you want to
14:57:44 18 work out with the dates. Make it realistic.

14:57:48 19 You'll find in my Court -- you've already done it --
14:57:51 20 but I expect you at all times to demean yourselves like the
14:57:56 21 professionals you are and make reasonable accommodations to one
14:58:01 22 another. And so I expect all of these other dates to be agreed
14:58:07 23 upon. I don't expect to get something back from you -- and I
14:58:10 24 particularly don't want to get something back that says: The
14:58:13 25 plaintiff wants the claims construction statement due on

14:58:18 1 February 1st and the defendant wants it due on January the
14:58:21 2 28th. Don't bring me little ticky-tacky three day or one day
14:58:27 3 or one week or something like that. Just work it out. Make
14:58:30 4 the accommodations.

14:58:31 5 How long do you think it will take you to sit down
14:58:34 6 and do that? When can I expect your information so I can craft
14:58:40 7 a scheduling order?

14:58:41 8 MS. WOOD: Your Honor, I'm actually out next week.
14:58:45 9 So if we could make it not next week but the following week to
14:58:49 10 submit it, I would be abundantly grateful.

14:58:53 11 MR. YUNGWIRTH: That's fine.

14:58:54 12 THE COURT: All right. Then you could get me
14:58:59 13 something by -- this would be a good day on a patent case --
14:59:02 14 Friday the 13th, in other words; is that right?

14:59:07 15 MR. YUNGWIRTH: That would be fine, Your Honor.

14:59:09 16 THE COURT: Because next week is the week of the
14:59:11 17 2nd. The next week is the week of the 9th.

14:59:14 18 MS. WOOD: Yeah. Friday the 13th is fine,
14:59:16 19 Your Honor.

14:59:17 20 THE COURT: All right. Then get to us by Friday the
14:59:22 21 13th the dates that you will agree upon to get all of this done
14:59:28 22 with a claims construction brief deadline or no later than
14:59:32 23 March 12th. You can back it up if you want to, but I want
14:59:36 24 everything in by March the 12th. We'll do the tutorial March
14:59:40 25 the 25th at 9:00 and the Markman March the 26th at 9:00.

14:59:47 1 Now, you can presume at this point, because I'm
14:59:49 2 orally telling you this, that those dates are going to happen.
15:00:05 3 And so, therefore, your stay is lifted to the extent you may go
15:00:08 4 ahead and proceed if you need to exchange things or anything
15:00:12 5 you need to do before I actually sign a scheduling order to
15:00:17 6 proceed on a scheduling order such as we described. You don't
15:00:21 7 have to sit on the formality of waiting until the end of
15:00:25 8 September because I haven't formally lifted the stay to let you
15:00:28 9 proceed forward with your pre-Markman scheduling order if
15:00:32 10 you-all want to have discussions and talk about it. We'll go
15:00:35 11 ahead and get this to you before the order is entered.

15:00:38 12 What I want you to do is recognize that you only have
15:00:41 13 one job in this case, and that's to resolve it. And you can
15:00:45 14 resolve it because you settle it, you can resolve it because I
15:00:49 15 grant a well-taken dispositive motion, or you can resolve it by
15:00:52 16 trial. And I don't care which it is. I'm not going to try to
15:00:57 17 talk you out of your trial. Okay? I look to try cases. I'd
15:01:01 18 rather try cases than do anything else.

15:01:04 19 If I had my way, we wouldn't go through any of the
15:01:06 20 things on the scheduling order. We'd just set you for trial,
15:01:10 21 and you'd get it ready, and we'd go to trial. So know that.
15:01:12 22 Your job is to get the case resolved, so start doing whatever
15:01:15 23 you need to do to get it resolved and don't wait on the
15:01:20 24 formality of the order.

15:01:20 25 Now, of course, you know, if somebody wants to get

15:01:23 1 real picky, that means I'm not going to grant any motion for
15:01:27 2 sanctions until I get the order entered because you claim, as
15:01:30 3 you walked out the courtroom, somebody said they'd have
15:01:33 4 something done by next week and you didn't get it done. But
15:01:36 5 know that. Start working on this right now and get us your
15:01:40 6 other proposed dates by September the 13th. You can count on
15:01:43 7 those dates. If they do what I want them to do as I've said
15:01:48 8 with the dates we've talked about here, then you're going to
15:01:52 9 get the dates you want. I'm not going to re-trade your deal.
15:01:56 10 And as soon as I get it, I will fold it into a scheduling order
15:02:00 11 that will have those dates and lift the stay in order for you
15:02:05 12 to proceed with Markman.

15:02:06 13 Now, the other reason to get you-all in here at the
15:02:10 14 kind of early stage of the case is to determine whether you
15:02:17 15 have any questions of me, anything you didn't find out when you
15:02:24 16 Googled me, anything about my staff, anything about the way we
15:02:27 17 do things, anything at all you might want to know that will
15:02:31 18 help you, because it's your case, as we go forward to make it
15:02:35 19 as easy on you as we can make it.

15:02:38 20 MR. YUNGWIRTH: No questions from Plaintiff,
15:02:40 21 Your Honor. We appreciate everything you did.

15:02:42 22 MS. WOOD: No questions from Defendants either.

15:02:44 23 THE COURT: All right. If you -- if you come up with
15:02:46 24 questions, you haven't waived your right to ask them. So if
15:02:52 25 there's nothing else, what we're going to do is this, and I'll

15:02:56 1 probably just fold this all into one order when we get your
15:02:58 2 dates. I'm going to consolidate the two cases, so everything
15:03:01 3 you do is fair game in either of the two case. We'll see where
15:03:06 4 we get after we get through Markman. If the case is not
15:03:09 5 settled, we'll see where we get after we go through more
15:03:13 6 discovery and see where we get close to trial.

15:03:15 7 But at any time, if it looks like one or both of
15:03:21 8 these cases are going to be tried, either of you can file a
15:03:24 9 motion for separate trials if you think that it's necessary.
15:03:26 10 And I will tell you I will look favorably on it. I'm not going
15:03:30 11 to put you to trial on it on both of them. So there you go.

15:03:34 12 If nothing else, it was good meeting you and having
15:03:37 13 you in here, and I look forward to working with you in this
15:03:40 14 case.

15:03:40 15 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
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